

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS JEROME VANCE,

Defendant-Appellant.

UNPUBLISHED

April 8, 2008

No. 274579

Saginaw Circuit Court

LC No. 06-027203-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), conspiracy to possess with intent to deliver a controlled substance less than 50 grams, MCL 333.7401(2)(a)(iv), and maintaining a drug house, MCL 333.7405(d). The trial court sentenced defendant as a second or subsequent drug offender, MCL 333.7413(2), to a prison term of 36 months to 8 years on the possession of controlled substance count, to be served concurrently with a prison term of 13 months to 40 years on the conspiracy count. The court also sentenced defendant to 64 days in jail with 64 days credit on the marijuana count and on the maintaining a drug house count. We affirm defendant's conviction for conspiracy to possess with intent to deliver a controlled substance less than 50 grams, but vacate the sentence on this conviction and remand to the trial court for resentencing. We affirm the remainder of defendant's convictions and sentences.

Defendant's convictions arose from a police raid on a rental house he owned. Defendant had rented the house to Robert Johnson, who had moved in on the night of the raid. Defendant was in the house when the police raided it, as were Johnson and another man. The police arrested all three men, and found that each was carrying a substantial amount of cash. The police also found 25 grams of cocaine base, in addition to cocaine powder and marijuana. Aside from the drugs, the police found razor blades, baggies, and scales. Two detectives testified that the amount of drugs and the accompanying paraphernalia indicated that the drugs were being held for distribution, rather than for individual use.

Defendant's first challenge is to the detectives' testimony. According to defendant, the testimony was unduly prejudicial because the prosecutor offered the testimony as substantive evidence of guilt. We review defendant's claim for plain error because defendant did not object

to the evidence at trial. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We find no plain error in the admission of the testimony.

Although the prosecutor sought to qualify only one of the detectives as an expert witness in drug trafficking, our review of the record supports the qualification of both as experts. The detectives had 9 years and 14 years of police experience respectively, and both demonstrated substantial knowledge of drug distribution methods. Both provided background testimony concerning drug trafficking without relating the trafficking evidence to defendant. Specifically, they testified that many of the seemingly benign items seized from the house “were routinely used to cut, weigh, package, and sell controlled substances.” *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). As in *Williams*, this “information was not within the layman’s common knowledge and was useful to the jury in determining defendant’s intent at the time he possessed the drugs.” *Id.* Further, we find that their testimony would assist the trier of fact in accordance with MRE 702, was consistent with the requirements of *People v Murray*, 234 Mich App 46, 56-57; 593 NW2d 690 (1999) and did not violate the prohibition of *People v Hubbard*, 209 Mich App 234, 241-242; 530 NW2d 130 (1995). Although it would have been preferable for the trial court to issue a limiting instruction on the drug trafficking testimony, the instructions concerning expert witnesses and police witnesses provided adequate notice to the jury regarding the proper use of the testimony in this case.

Although the line between permissible and impermissible use of drug profile evidence is subtle, *Murray*, *supra* at 58, under the circumstances of this case that line was not crossed and error did not occur. Moreover, defendant fails to establish either his actual innocence or that the fairness and integrity of the proceedings was compromised by the introduction of the expert testimony. *Carines*, *supra* at 774.

Defendant next challenges the sufficiency of the evidence on his conspiracy conviction. We review sufficiency claims de novo to determine whether a reasonable juror could have found that the prosecutor proved the elements of the charged crime. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Defendant maintains that the prosecutor failed to provide sufficient evidence on the agreement element of the conspiracy charge. To establish an agreement, the prosecutor had to provide evidence of the circumstances, acts, and conduct of the parties to demonstrate that they had reached an agreement in fact. *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

We find that the circumstantial evidence was sufficient to demonstrate the existence of an agreement. Defendant testified that he knew Johnson before renting the house to him. He further testified that he knew Johnson brought drugs, baggies, and scales into the house. Although he testified that he made no agreement with Johnson concerning the drugs, the jury apparently did not believe his denial. Deferring to the credibility determinations of the trier of fact, *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974), and viewing the evidence in the light most favorable to the prosecution, *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002), we conclude that the jury could reasonably infer that defendant and Johnson had reached an agreement to possess the cocaine and marijuana recovered with the intent and common purpose to sell the controlled substances.

Defendant's last challenge is to his sentence. He asserts that a 36-month minimum sentence imposed on his conspiracy conviction constituted an unsupported departure from the sentencing guidelines. Because of discrepancies in the lower court record, a review of defendant's sentences for possession and conspiracy are reviewed and discussed in detail.

We first note that defendant was sentenced on his possession conviction, MCL 333.7403(2)(a)(v), to 36 months to eight years in prison in accordance with his status as a subsequent drug offender. MCL 333.7413(2). In *People v Williams*, 268 Mich App 416, 429-430; 707 NW2d 624 (2005), this Court determined that the doubling provision of MCL 333.7413(2) authorizes trial courts to double the minimum sentence for repeat offenders. Defendant does not contest the determination that he is a repeat drug offender. The guideline minimum range for defendant's cocaine possession conviction was 5 to 23 months, making the doubled minimum range 10 to 46 months. MCL 777.68; MCL 333.7413(2). The 36-month minimum was well within the acceptable range. *Williams, supra* at 430-431. As such, the sentence imposed for defendant's possession conviction was not error.

In addition, defendant was convicted of conspiracy to possess with intent to deliver a controlled substance less than 50 grams pursuant to MCL 333.7401(2)(a)(iv). Defendant was sentenced to 13 months to 40 years in prison according to the Judgment of Sentence. However, we note that the Judgment of Sentence also indicated that this conviction was subject to enhancement. The guidelines scoring for the minimum range for this conviction, without enhancement, was 10 to 23 months. MCL 777.66. The statutory maximum for the offense is 20 years. MCL 333.7401(2)(a)(iv). The trial court imposed a sentence of 13 months to 40 years, which is denoted on the Judgment of Sentence. The trial court appears to have enhanced defendant's maximum sentence for this conviction in accordance with MCL 333.7413(2), but did not enhance the minimum sentence imposed. It is this sentence, which both defendant and plaintiff contest as error.

Defendant asserts, citing to *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003) that the trial court erred in its upward deviation from the guidelines because it failed to provide substantial and compelling reasons. Plaintiff asserts the trial court intended to deviate from the guidelines and sentence defendant to a minimum of 36 months for this conviction but erred only in the ministerial act of recording the sentence on the judgment of sentence. Plaintiff contends the trial court's basis for the upward deviation was substantial and compelling, noting the trial court's reference to defendant's conspiring with "big-time people" that were "delivering cocaine in kilos."¹ Unfortunately, the sentencing transcript is unclear as the trial court initially indicated, with regard to the conspiracy conviction, "maximum, 40; minimum, 13 months." The trial court noted, "As I indicated this is a deviation of 13 months above the guidelines," which could be construed as being applicable to either the sentence imposed for possession or an enhanced sentence on the conspiracy conviction. When defendant's counsel sought clarification

¹ Contrary to their argument on appeal, we note the plaintiff submitted a sentencing memorandum to the trial court seeking enhancement of defendant's conspiracy conviction pursuant to MCL 333.7413(2).

regarding the 13 months, the trial court replied “Thirty-six” in reference to the minimum sentence imposed with “the maximum is 40 on one and 8 on the other.”

The issue then becomes whether the trial court intended to enhance defendant’s sentence for conspiracy and, if so, is the proper enhancement through MCL 333.7413(2) or the habitual offender statutes, MCL 769.10 *et seq.* This Court has previously determined that “[a]s a specific and comprehensive measure the [controlled-substance article’s] sentence-augmentation provision controls over the general habitual offender statute.” *People v Wyrick*, 265 Mich App 483, 493; 695 NW2d 555 (2005), vacated in part on other grounds 474 Mich 947 (2005), quoting *People v Edmonds*, 93 Mich App 129, 135; 285 NW2d 802 (1979). We note the existence historically of a distinction, which recognized that “crimes of attempting to commit and conspiracy to commit a substance offense are separate from the substantive offense itself,” *People v Burton*, 252 Mich App 130, 134; 651 NW2d 143 (2002), citing *People v Briseno*, 211 Mich App 11; 535 NW2d 559 (1995) and *People v Anderson*, 202 Mich App 732; 509 NW2d 548 (1993), rendering enhancement under MCL 333.7413 inappropriate. Similar to these earlier cases, defendant was charged under the general conspiracy statute, MCL 750.157a, rather than MCL 333.7407a, which is a specific statute criminalizing attempts to violate the controlled substance provisions of the Public Health Code.

Consequently, it appears that the trial court indicated in both the judgment of sentence and the sentencing transcript an intention to enhance defendant’s sentence for the conspiracy conviction. However, it is unclear whether the trial court was sentencing defendant on the conspiracy conviction pursuant to the guidelines for habitual offenders or using MCL 333.7413. Neither party fully addresses or acknowledges this discrepancy. Because the trial court may have improperly enhanced defendant’s conspiracy conviction, using MCL 333.7413, and the record is not sufficiently clear regarding the trial court’s intent and method for enhancement of defendant’s sentence based on his status as a habitual offender, it is necessary to remand this issue to the trial court for further clarification and resentencing.

We affirm defendant’s conviction for conspiracy to possess with intent to deliver a controlled substance less than 50 grams, but vacate defendant’s sentence on this conviction and remand to the trial court for resentencing. We affirm the remainder of defendant’s convictions and sentences. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto